No. 73-88

In the Supreme Court of the United States

OCTOBER TERM, 1973

UNITED STATES OF AMERICA, PETITIONER
v.
EUGENE H. EDWARDS AND WILLIAM T. LAVEMAY

ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SIXTH CIRCUIT

BRIEF FOR THE UNITED STATES

ROBERT H. BORK,
Solicitor General,
HENRY E. PETERSEN,
Assistant Attorney General,
EDWARD S. SMITH,
Assistant to the Solicitor General,
JEROME M. FEIT,
VICTOR E. STONE,
Attorneys,
Department of Justice,
Washington, D.C. 20530.

INDEX

CITATIONS

837-424—73——1

In the Supreme Court of the United States

OCTOBER TERM, 1973

No. 73-88

UNITED STATES OF AMERICA, PETITIONER

v.

EUGENE H. EDWARDS AND WILLIAM T. LIVESAY

ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SIXTH CIRCUIT

BRIEF FOR THE UNITED STATES

OPINIONS BELOW

The opinion of the court of appeals in *Edwards* (Pet. App. A, pp. 1a-15a) is reported at 474 F.2d 1206. The court of appeals did not write an opinion in *Livesay*, but entered an order (Pet. App. B, p. 16a) reversing the judgment of conviction on the basis of its opinion in *Edwards*.

JURISDICTION

The judgment of the court of appeals in *Edwards* (Pet. App. C, p. 17a) was entered on March 8, 1973, and in *Livesay* (Pet. App. B, p. 16a) on April 11, 1973. Timely petitions for rehearing with suggestion

for rehearing *en banc* were denied on May 10, 1973 (Pet. Apps. D and E, pp. 18a, 19a). On May 31, 1973, Mr. Justice Stewart extended the time for filing a petition for a writ of certiorari to and including July 9, 1973. The petition was filed on that date and was granted on October 9, 1973 (A. 36). The jurisdiction of this Court rests on 28 U.S.C. 1254(1).

QUESTION PRESENTED

Whether the Fourth Amendment requires that a search warrant be obtained to seize an accused's clothing, after he has been arrested on probable cause and while he is being held in custody, when there is cause to believe that the clothing contains evidence of his complicity in the offense of which he is accused.

CONSTITUTIONAL PROVISION INVOLVED

The Fourth Amendment to the Constitution provides:

> The right of the people to be secure in their persons, houses, papers, and effects, against unreasonable searches and seizures, shall not be violated, and no warrants shall issue, but upon probable cause, supported by oath or affirmation, and particularly describing the place to be searched, and the persons or things to be seized.

STATEMENT

After a jury trial in the United States District Court for the Southern District of Ohio, respondents were convicted of attempting to break and enter a United States Post Office, in violation of 18 U.S.C. 2115. Both were sentenced to five year terms of im-

prisonment, with possibility of early parole under 18 U.S.C. 4208(a)(2).

The relevant facts are recounted in the opinion of the court of appeals (Pet. App. A, pp. 1a–3a). They show that shortly after 11:00 p.m. on May 31, 1970, respondents were lawfully arrested and charged with attempting to break into the Lebanon, Ohio, post office. Respondent Edwards was arrested with a companion as he walked away from the post office (*id.* at 2a); respondent Livesay was arrested as he was hiding in a nearby automobile (A. 4–5, 17). The two were then transported to the local jail and placed in separate cells (A. 13, 18, 28, 32).

Later that evening an investigation by local police authorities revealed that the attempt to enter the post office had been made through a window on the north side of the building. A heavy metal mesh screen around the window had been broken and bent inward; the wooden window appeared to have been forced up with a pry bar, and there were paint chippings on the windowsill (A. 9–10, 12, 14, 26–27). Various items of evidence, including a pry bar, were collected, and the window was photographed (A. 11, 12); the automobile in which Livesay had been arrested was impounded (A. 2, 5).

On the following morning, the investigation "started where [the officers] had left off the night before" (A. 20). Paint samples were taken from the window (A. 31), a warrant was obtained to search the automobile (A. 4–5), and trousers and T-shirts were purchased for respondents (A. 20, 33), who were still dressed in the clothing which they had been wearing at

the time of their arrest (Pet. App. A, p. 3a). At the officers' request, respondents turned over their shoes, trousers, shirts, and a sweater and donned the new clothing (A. 19–20, 25–26, 30). Scientific examination of paint traces found on respondents' clothing and comparison of those traces with paint chips taken from the damaged post office window showed that both samples came from the same source (A. 24, 34–35).

2. After an evidentiary hearing, the district court overruled respondents' motion to suppress the results of the examination of the paint chips (A. 1). On appeal following conviction, the court of appeals reversed. Expressly rejecting the contrary holdings of two other courts of appeals[1] (Pet. App. A, p. 10a), the court below held that where law enforcement officers do not search and seize all personal effects immediately after an arrest, a subsequent warrantless seizure from the arrestee violates the Warrant Clause of the Fourth Amendment. The court held that "a search cannot be incident to an arrest after the administrative process and the mechanics of the arrest have come to a halt and the prisoner is in jail. At this point, the justifications for the 'search incident' exception no longer exist" (*ibid.*). Therefore, it concluded that, although respondents' arrest was lawful and probable cause existed for the seizure of the clothing, the failure of the police officers to obtain a warrant rendered the search of the clothing unlawful

[1] *United States* v. *Williams*, 416 F.2d 4 (C.A. 5); *United States* v. *Curzie*, 358 F.2d 184, 185–186 (C.A. 2).

and required suppression of the evidence derived therefrom.

SUMMARY OF ARGUMENT

The history and evolution of the Warrant Clause of the Fourth Amendment show that it was principally directed to ensuring the privacy of the home and similar places against unrestricted searches and seizures. The clause mandates specificity of purpose for a search and interposes a detached magistrate between the police and the privacy of a citizen's home.

On the other hand, the acceptance of warrantless searches of arrestees after arrest evolved in an entirely different historical context. Such searches involved none of the abuses which troubled the Framers of the Warrant Clause. The only victims of such searches were those who were either caught in the act of committing a crime, or were the objects of hue and cry or an arrest warrant. Accordingly, it was early concluded that the privacy of an individual at the time of a search of his person incident to an arrest was sufficiently protected by the requirement for probable cause underlying his arrest, and such lawful restraint and incidental search were not considered to entail the kind of wholesale and wide-ranging invasion of privacy for which the Framers considered a warrant requirement appropriate.

The law is clear, therefore, that after the arrest of a defendant, law enforcement officers may undertake "a relatively extensive exploration of the person," not only for concealed weapons but for evidence which he may have in his possession. *Terry* v. *Ohio*, 392 U.S. 1, 25; *Weeks* v. *United States*, 232 U.S.

383, 392. Moreover, because of the limited privacy interests that attach in such circumstances, it is not necessary to justify a warrantless post-arrest search of the person of the arrestee by a showing that evidence obtained thereby was otherwise in danger of being destroyed.

The fact that a post-arrest search does not take place "contemporaneous[ly] with and [is not] confined to the immediate vicinity of the arrest" (Pet App. A, p. 8a) is basically irrelevant to the considerations which underly the Warrant Clause. The contrary holding of the court of appeals resulted from its mistaken reliance on cases involving efforts by law enforcement officers to undertake extensive searches of a defendant's home and surrounding premises, simply because he was arrested there. There is, however, a substantial distinction between such searches and the minimal additional intrusion which a post-arrest search of an individual in a police station involves.

The search and seizure of respondents' clothing for evidence of their participation in the offense concededly did not offend the Fourth Amendment's general proscription against unreasonable searches and seizures. Respondents were arrested at the scene of the crime and under circumstances which justified the belief that they had attempted to break into the post office. There was, as the court of appeals found, probable cause to believe that an examination of their clothing would lead to the discovery of highly probative evidence. The conduct of the law enforcement officers who made the post-arrest seizure of the clothing did not, moreover, involve any overreaching or use of force or coercion.

While it is true that the law enforcement officers here had no reason to believe that respondents were aware of the damaging evidence on their clothing and thus had no reason to fear that this evidence would be destroyed, this fact alone does not justify the conclusion that a warrant was required, since the historic basis for the post-arrest exception to the Warrant Clause does not rest alone on this consideration. But even if it did, the cases recognize that where, because of exigent circumstances, a search could have been made without a warrant at the time of arrest, a search at a later time, when such exigent circumstances are no longer present, is nevertheless justified without a warrant.

Finally, we submit that the likely effect of an extension of the Warrant Clause to non-contemporaneous searches will be to encourage more extensive searches and seizures at the time of arrest, rather than to encourage resort to a magistrate. Such a holding would thus defeat rather than foster the privacy values embodied in the Fourth Amendment. Reasonableness should be the governing standard for police evidentiary searches of jailed suspects.

ARGUMENT

THE FOURTH AMENDMENT DOES NOT REQUIRE THAT A WARRANT BE OBTAINED TO SEARCH THE PERSON OF ONE LAWFULLY UNDER ARREST AND IN CUSTODY, SIMPLY BECAUSE THE SEARCH DOES NOT OCCUR CONTEMPORANEOUSLY WITH THE ARREST

It is incontestible that, after a lawful arrest, law enforcement officers may conduct "a relatively extensive exploration of the person" without a search warrant, not only for concealed weapons but for evidence. *E.g.*,

Terry v. *Ohio*, 392 U.S. 1, 25; *Weeks* v. *United States*, 232 U.S. 383, 392. As this Court observed in *Chimel* v. *California*, 395 U.S. 752, 755, there is a right "always recognized under English and American law to search the person of the accused when legally arrested to discover and seize the fruits or evidences of crime."

While the court of appeals recognized this established principle, it deemed it inapplicable to this case because the seizure was not "substantially contemporaneous with and confined to the immediate vicinity of the arrest" (Pet. App. A, p. 8a). It held that in the circumstances here—a search at the jailhouse occurring some ten hours after the arrest—the search and seizure could be justified only under a warrant. This ruling is at odds with the history of the Fourth Amendment and interposes a warrant requirement where the values that the warrant requirement are meant to preserve do not require it.

A. THE HISTORICAL BACKGROUND OF THE FOURTH AMENDMENT AND MODERN PRACTICE PROVIDE NO BASIS FOR THE RULING BELOW

The Warrant Clause was never intended to apply to searches and seizures such as are involved in the instant case. The history and evolution of the Fourth Amendment have been well-documented in the decisions of the Court,[1] and there is no need to repeat this material at length here. Suffice it to say that this Court has stated

[1] See, e.g., *Stanford* v. *Texas*, 379 U.S. 476, 481–485; *Marcus* v. *Search Warrant*, 367 U.S. 717, 724–729; *Frank* v. *Maryland*, 359 U.S. 360; *Harris* v. *United States*, 331 U.S. 145, 157–161 (dissent); *Boyd* v. *United States*, 116 U.S. 616, 624–630.

that the Warrant Clause "was most immediately the product of contemporary revulsion against a regime of writs of assistance." *Stanford v. Texas*, 379 U.S. 476, 482. As the Court further pointed out in *Stanford*:

> * * * Vivid in the memory of the newly independent Americans were those general warrants known as writs of assistance under which officers of the Crown had so bedeviled the colonists. The hated writs of assistance had given customs officials blanket authority to search where they pleased for goods imported in violation of the British tax laws. They were denounced by James Otis as "the worst instrument of arbitrary power, the most destructive of English liberty, and the fundamental principles of law, that ever was found in an English law book," because they placed "the liberty of every man in the hands of every petty officer." * * * [379 U.S. at 481.]
>
> * * * In an opinion which this Court has characterized as a wellspring of the rights now protected by the Fourth Amendment, Lord Camden declared the [general] warrant to be unlawful. "This power," he said, "so assumed by the secretary of state is an execution upon all the party's papers, in the first instance. His house is rifled; his most valuable secrets are taken out of his possession, before the paper for which he is charged is found to be criminal by any competent jurisdiction, and before he is convicted either of writing, publishing, or being concerned in the paper." *Entick v. Carrington* [19 How. St. Tr. 1029, 1064]. Thereafter, the House of Commons passed two reso-

> lutions condemning general warrants, the first limiting its condemnation to their use in cases of libel, and the second condemning their use generally. [379 U.S. at 484; footnotes omitted.]

In short, the Warrant Clause was adopted to eliminate unrestricted invasions of homes, places of business, and similar areas, except with the protection of intervening judicial authority. The clause mandates specificity of purpose for a search and interposes a detached magistrate between the police and the privacy of a citizen's home. "The right of privacy was deemed too precious to entrust to the discretion of those whose job is the detection of crime and the arrest of criminals. * * * And so the Constitution requires a magistrate to pass on the desires of the police before they violate the privacy of the home." *McDonald* v. *United States*, 335 U.S. 451, 455–456; *Chimel* v. *California*, 395 U.S. 752; *Johnson* v. *United States*, 333 U.S. 10, 14.

On the other hand, warrantless searches of the person of an arrestee after his lawful arrest evolved in an entirely different historical context. As Professor Telford Taylor points out in *Two Studies in Constitutional Interpretation* 30 (1969), "arrest searches involved none of the abuses against which Otis and Camden railed. The only victims of such searches were those who, as probable felons, were the objects of hue and cry, hot pursuit, or an arrest warrant," and it was accepted that "their persons [should] be subject to search for the fruits of their crimes, or the wea-

pons, clothes or other objects that might identify them as felons * * *."[1]

Indeed, the English cases carefully distinguish, as do our own, a search of the person of the arrestee from a search of a home under general warrant, such as had occurred in *Entick* v. *Carrington*, *supra*. In *Dillon* v. *O'Brien and Davis*, 16 Cox Crim. Cas. 245, 249–251, 20 L.R. Ir. 300, 316–319 (1887), Pates, C.B., commenting on the right to search the person of an arrestee incident to an arrest, stated:

> * * * [I]t is clear and beyond doubt, that, at least in cases of treason and felony, constables (and probably also private persons) are entitled, upon a lawful arrest by them of one charged with treason or felony, to take and detain property found in his possession which will form material evidence in his prosecution for that crime. [And see, 10 *Halsbury's Laws of England* 356 (3d ed. Simonds, 1955).] * * * Its purpose and object, viz., to produce the goods in evidence in a judicial proceeding, appears to me to show that it must be derived from the interest which the State has in a person guilty (or reasonably believed to be guilty) of a crime being brought to justice, and in a prosecution, once commenced, being determined in due course of law. * * * In [*Entick* v. *Carrington*] there was no allegation of the plaintiff's guilt, nor that there was reasonable or probable

[1] "The old rule held good that if by hue and cry a man was captured when he was still in mirin of his crime—if he was still holding the grey knife or driving away the stolen beasts * * * he could not be heard to say that he was innocent * * *." 2 Pollock & Maitland, *The History of English Law* 579 (2d ed. 1898).

cause for believing him guilty, nor that a crime had, in fact, been committed by anyone, nor that he had in his possession anything that was evidence of (or that there were reasonable grounds for believing might be evidence of) a crime committed by him or anyone else. The nature of the question there is shown by the statement of Lord Camden that "If this point should be determined in favour of the jurisdiction, the secret cabinets and bureaux of every subject in this kingdom will be thrown open to the search and inspection of a messenger, whenever the Secretary of State shall think fit to charge, or even to suspect, a person to be the author, printer, or publisher of a seditious libel." Lord Camden takes pains to show that the word "papers" in the warrant could not, in point of law, be restrained to libellous papers only, and he adds: "All the papers and books, without exception, if the warrant be executed according to its tenor, must be seized and carried away, for it is observable, that nothing is left either to the discretion or to the humanity of the officer." * * * For myself I am satisfied that, in pronouncing that judgment, Lord Camden had not before his mind cases of seizure of evidences of guilt upon lawful apprehension, as distinguished from general warrants to seize all papers. * * *

Accord, *Elias* v. *Pasmore*, 2 K.B. 164, 172 (1934).

Thus, both in the United States and in England, it was early concluded that invasion of the privacy of an individual at the time of a search of his person in-

cident to an arrest was fully justified by the probable cause underlying his arrest, and that such a lawful restraint and incidental search was not the kind of wholesale and wide-ranging invasion of privacy about which Lord Camden and the Framers of the Warrant Clause were concerned. A warrantless post-arrest search of an arrestee is justifiable "not because the protections of the Constitution become any less meaningless after an arrest * * * but because the definition of that which is 'unreasonable' under the Fourth Amendment is altered significantly when a valid arrest has been made." *United States* v. *Simmons*, 302 A. 2d 728, 730 (D.C. Ct. App.).

In sum, the foregoing historical analysis suggests that the Warrant Clause was never intended to have the consequence that any search or seizure, of whatever kind, would necessarily have to be supported by a warrant (unless falling within certain narrowly defined exceptions), even though fully reasonable in nature and extent and supported by probable cause. As further discussed below, the cases in which this Court has recognized a warrant requirement, notwithstanding reasonableness and probable cause, have involved searches of houses, business premises, or the like[1]—reflecting a recognition that the nature of the intru-

[1] The status of automobiles is somewhat uncertain. While *Coolidge* v. *New Hampshire*, 403 U.S. 443, involved application of the warrant requirement to the seizure of an automobile, it was held to be significant that the automobile was physically situated on private property, which had to be entered in order to effect the seizure (see 403 U.S. at 465, n. 20).

sion was such as to demand the interposition of a neutral and detached magistrate between the citizen and the police. The warrant requirement has also been suggested as being applicable to non-probable cause, but reasonable, stops and searches of vehicles on the highway. *Almeida-Sanchez* v. *United States*, No. 71-6278, decided June 21, 1973, slip op., pp. 5-11 (Powell, J., concurring). In the circumstances of the instant case, by contrast, we are not dealing with the kind of important privacy interest respecting which the warrant requirement was ever intended, has ever been held by this Court, or ought reasonably be held to apply.[1]

---

[1] The question whether a warrant requirement ought automatically be attached to every kind of search and/or seizure, regardless of surrounding circumstances, unless one of the traditional exceptions applies, is also presented to the Court (in a different factual context, involving a much lesser intrusion, but in the absence of probable cause) in our pending petition for certiorari in *United States* v. *Gray*, No. 73-706.

It might be suggested that the difference between the proposition for which we here contend (the inapplicability *vel non* of the warrant requirement to certain types of searches and seizures) and the traditional approach (entailing the identification and elaboration of various exceptions to a generally applicable warrant requirement) is one of semantics only. Indeed, the lines of distinction are blurred by the facts of this very case—as we show in the ensuing argument, the admissibility of the evidence is clear under conventional analysis. We believe, nevertheless, that there are many circumstances in which the distinction is significant and the approach we here suggest permits the correct result to be reached by a better reasoned and more direct line of analysis. *United States* v. *Gray*, *supra*, where law enforcement officers briefly examined weapons found during the course of an otherwise lawful search of Gray's home, may present such a case. The weapons were not the object of the search, nor were they described in the warrant. The court of appeals, rather than examining the nature of the intrusion in light of the considerations which underlie the warrant require-

B. THE FACT THAT THE SEARCH IN THIS CASE OCCURRED SOME HOURS AFTER THE ARREST DID NOT BRING INTO PLAY THE WARRANT REQUIREMENT OF THE FOURTH AMENDMENT

1. The seizure and search of respondents' clothing for evidence of their participation in the offense was plainly reasonable. Respondents were arrested at the scene of the crime and under circumstances which justified the belief that they had attempted to break into the post office. There was, as the court of appeals found, probable cause to believe that an examination of their clothing would lead to the discovery of highly probative evidence. Moreover, the conduct of the law enforcement officers who made the post-arrest seizure of the clothing did not involve any overreaching or use of force or coercion. Respondents were not subject to any personal humiliation either by the locale of the seizure or by its scope. On the contrary, the police officers waited until morning to purchase new clothing before they asked respondents to remove their own clothing.

The fact that the taking of the clothing did not transpire "contemporaneous[ly] with and [was not] confined to the immediate vicinity of the arrest" (Pet. App. A, p. 8a), which the court of appeals found dispositive, is basically irrelevant to the considerations which underlie the post-arrest exception to the Warrant Clause. The holding of the court of appeals was based almost wholly on cases such as *Chimel* v. *California*, 395 U.S. 752, and

---

ment, held that the examination of the weapons constituted an illegal search and seizure because it did not fall within any previously delineated exception to the Warrant Clause.

Coolidge v. *New Hampshire*, 403 U.S. 443, which did not involve post-arrest searches of the person arrested. The holding in *Chimel* regarding the limited scope of a search incident to arrest was made in the context of a situation in which law enforcement officers attempted to justify extensive searches of the defendant's home—including areas on those premises beyond the defendant's immediate reach—as incident to his arrest. The search thus involved an area which the Fourth Amendment intended to protect from warrantless intrusions by law enforcement officers; as the Court noted, a "top-to-bottom search of a man's house" (395 U.S. at 766–767, n. 12) could not be considered a "minor" invasion of his privacy to be tolerated as incidental to his lawful arrest. Similarly, *Coolidge* involved an intrusion onto the defendant's property to seize his automobile (*see* note 4, *supra*).[5]

In those cases, the Court held only that, barring exigent circumstances, a search of a defendant's home incident to arrest must be limited to his person and the areas within his immediate reach (*Chimel*, *supra*, 395 U.S. at 766). As the Court of Appeals for the First Circuit stated in rejecting a claim similar to that raised here (*United States* v. *DeLeo*, 422 F. 2d 487, 492): "We read *Chimel* as being acutely concerned about the increasing legitimation of wide-ranging war-

[5] The present case does not involve a search entailing "intrusion into the human body" (*Schmerber* v. *California*, 384 U.S. 757, 770), where, barring exigent circumstances, the substantial invasion of privacy involved might require a warrant.

rantless searches of lodgings and buildings based on the fortuity of arrest on the premises * * *."[1]

A search of the person, even some time after his arrest, stands on an entirely different footing. It is one thing to say that "the Constitution requires a magistrate to pass on the desires of the police before they violate the privacy of the home," *McDonald* v. *United States*, 335 U.S. 451, 456, since, if anything less were required, there would be no rational limits to police intrusion. See *Harris* v. *United States*, 331 U.S. 145, 197 (dissenting opinion of Mr. Justice *Jackson*), quoted approvingly in *Chimel*, *supra*, 395 U.S. at 766, n. 11. It is, however, an entirely different matter to condemn the warrantless seizure of an arrestee's clothing at a time and place (here a jail

---

[1] *Preston* v. *United States*, 376 U.S. 364, on which the court of appeals also relied, involved the warrantless search of an automobile, without probable cause, some five hours after the arrest of the defendants. In holding that the search of the vehicle was unjustified, the Court stated (376 U.S. at 367):

"Once an accused is under arrest and in custody, then a search [of his automobile] made at another place, without a warrant, is simply not incident to the arrest."

This Court subsequently limited *Preston* to stand only for the proposition that a search and seizure of an automobile made at a place other than where the arrest occurred, *without probable cause*, is an unreasonable search and seizure that cannot be justified as incident to lawful arrest. *Chambers* v. *Maroney*, 399 U.S. 42, 47; see also *Cady* v. *Dombrowski*, No. 72-556, decided June 21, 1973. Where, however, probable cause to search for evidence or contraband exists, then a search of an automobile after an arrest "made at another place, without a warrant" does not violate the Warrant Clause. *Chambers* v. *Maroney*, *supra*, 399 U.S. at 48-52 (see *infra*, pp. 19-21).

house)[4] different from the time and place of probable cause arrest. The deep-rooted policy considerations which necessitate the securing of a search warrant to justify searching a citizen's premises are not present when his right of privacy has already been lawfully restricted by virtue of his arrest, and he is in custody.

This distinction was aptly drawn by the Court of Appeals for the Ninth Circuit in *Charles* v. *United States*, 278 F. 2d 386, certiorari denied, 364 U.S. 831. There, after observing that the arrest of a person cannot justify a search of his entire home for evidence unrelated to the crime for which he was arrested ("the fact of arrest does not justify [such] impairment of the right to privacy"), the court held that a contrary rule was applicable to searches of the person (278 F. 2d at 388–389):

> [I]t seems to us that a search of the person of the accused, even for the purpose of uncovering evidence of a crime other than that which is charged, is generally incident to a valid arrest. Power over the body of the accused is the essence of his arrest; the two cannot be separated. To say that the police may curtail the liberty of the accused but [must] refrain from impinging upon the sanctity of his pockets except for enumerated reasons is to ignore the custodial duties which devolve upon arresting authorities. Custody must of necessity be as-

[4] In *Lanza* v. *New York*, 370 U.S. 139, 143, this Court rejected the suggestion "that a public jail is the equivalent of a man's 'house' or that it is a place where he can claim constitutional immunity from search or seizure of his person, his papers, or his effects * * *."

> serted initially over whatever the arrested party has in his possession at the time of apprehension. Once the body of the accused is validly subjected to the physical dominion of the law, inspections of his person, regardless of purpose, cannot be deemed unlawful, see *People* v. *Chiagles*, 1928, 237 N.Y. 193, 142 N.E. 583, 32 A.L.R. 670, unless they violate the dictates of reason either because of their number or their manner of perpetration."

The searches of respondents here did not, merely because of the passage of several hours from the time of their arrest, "violate the dictates of reason either because of their number or their manner of perpetration."

2. Although, as the court of appeals found, the law enforcement officers here had no reason to believe that respondents were aware of the damaging evidence on their clothing or that this evidence would be destroyed if time were taken to obtain a warrant, this fact alone

---

[1] "While the legal arrest of a person should not destroy the privacy of his premises, it does—for at least a reasonable time and to a reasonable extent—take his own privacy out of the realm of protection from police interest in weapons, means of escape, and evidence." *United States* v. *DeLeo*, 422 F. 2d 487, 493 (C.A. 1), certiorari denied, 397 U.S. 1037; Accord: *United States* v. *Caruso*, 358 F. 2d 184 (C.A. 2), certiorari denied, 385 U.S. 862; *United States* v. *Gonsales-Perez*, 426 F. 2d 1283 (C.A. 5); *United States* v. *Manarr*, 454 F. 2d 542 (C.A. 7); *Rodgers* v. *United States*, 362 F. 2d 558 (C.A. 8), certiorari denied, 385 U.S. 993; *Cotton* v. *United States*, 371 F. 2d 385 (C.A. 9); *Malone* v. *Crouse*, 380 F. 2d 741 (C.A. 10), certiorari denied, 390 U.S. 965; *Shelton* v. *United States*, 404 F. 2d 1292 (C.A. D.C.). Cf. *Abel* v. *United States*, 362 U.S. 217, 239.

does not require the conclusion that a warrant must have been obtained.

The historic basis for the post-arrest exception to the Warrant Clause, as we have shown, does not rest principally on feared destruction of evidence, although that is certainly one consideration (Chimel v. California, supra, 395 U.S. at 764), but on the presence of various factors which were thought to eliminate the necessity for the important protections which the warrant procedure affords.

We submit, however, that even if this "exigent" circumstance—the feared destruction of evidence—is held to be the exclusive basis for the exception justifying "a relatively extensive exploration of the person" without a warrant contemporaneously with an arrest, such a search may nevertheless be undertaken at a later time, provided law enforcement officers have some reason to believe that the search will yield evidence of the individual's complicity in the offense.

Particularly apposite here are the cases involving the exception to the Warrant Clause for automobile searches. The basic justification for such searches turns on the mobility of the vehicle and the ease with which it may be "moved out of the locality or jurisdiction in which the warrant [is] sought." Carroll v. United States, 267 U.S. 132, 153. As the Court stated in Chambers v. Maroney, 399 U.S. 42, 51, "exigent circumstances" justify the warrantless search of "an automobile stopped on the highway" where there is probable cause, because the car is "movable, the occupants are alerted, and the car's contents may never

*be found again if a warrant must be obtained. * * * [T]he opportunity to search is fleeting * * *."*

But the Court in Chambers recognized that, where a vehicle could have been stopped and searched on the highway without a warrant, a search of the vehicle "made at another place, without a warrant," even though exigent circumstances are no longer present, does not violate the Warrant Clause. As the Court explained in Coolidge v. New Hampshire, supra, 403 U.S. *at 463, n. 20 (emphasis in original):*

> *The rationale of Chambers is that given a justified initial intrusion, there is little difference between a search on the open highway and a later search at the station. Here, we deal with the prior question whether an initial intrusion is justified.*

In the present case, like Chambers and unlike Coolidge, there was a justified initial intrusion—the arrest of the respondents based upon probable cause. If, as is conceded, their clothing could have been taken at that time without a warrant, then it is submitted that there is "little difference" between such a seizure, and a "later search [and seizure] at the station."

C. THE DECISION BELOW DEPRIVES RATHER THAN FOSTERS FOURTH AMENDMENT VALUES

We have shown that the Warrant Clause was not intended to apply to post-arrest searches of a defendant and that, under the holdings of this Court, its application here is inappropriate. There are additional considerations of policy, moreover, which support such a construction of the Fourth Amendment.

As this Court observed in *Terry* v. *Ohio*, 392 U.S. 1, 12:

> Ever since its inception, the rule excluding evidence seized in violation of the Fourth Amendment has been recognized as a principal mode of discouraging lawless police conduct. See *Weeks* v. *United States*, 232 U.S. 383, 391–393 (1914). Thus its major thrust is a deterrent one, see *Linkletter* v. *Walker*, 381 U.S. 618, 629–635 (1965), and experience has taught that it is the only effective deterrent to police misconduct in the criminal context, and that without it the constitutional guarantee against unreasonable searches and seizures would be a mere "form of words."

In the context of post-arrest searches, extension of the Warrant Clause and the exclusionary rule to searches and seizures which do not take place "contemporaneous[ly] with and [are not] confined to the immediate vicinity of the arrest" (Pet. App. A, p. 8a) will likely have the effect of deterring reasonable police conduct and encouraging unnecessary intrusion into privacy. This is so because a "relatively extensive" search for evidence "contemporaneous" with an arrest, as we have shown, need not be accompanied by a warrant or be justified by a showing of probable cause, beyond the showing necessary to justify the arrest. A search pursuant to a warrant, on the other hand, requires an express showing of probable cause to believe that evidence described in the warrant will be found.

Because of this, we believe that a holding extending the Warrant Clause to post-arrest searches which

do not take place contemporaneously with the arrest will not encourage law enforcement officers to obtain warrants; rather it will only encourage more extensive "contemporaneous" searches and seizures. This consideration was recognized by the Court of Appeals for the Second Circuit in United States v. Caruso, 358 F. 2d 184, 185–186, in rejecting a claim similar to that raised here:

> *The appellant's contention means that the seizure of his clothing could have been made constitutionally only if, immediately on his arrest, he had been stripped to the buff on the public highway. Even though that April 13th may have been a very pleasant spring day, we are of the opinion that the argument is somewhat extreme.*

Similarly, in the instant case, the cause of a substantial portion of the ten-hour delay between arrest and search resulted from the fact that the law enforcement officers of Lebanon, Ohio, waited until morning to purchase a new set of clothes for respondents. The construction of the Warrant Clause adopted by the court of appeals can only have the effect of discouraging such reasonable police behavior.

CONCLUSION

The judgments of the court of appeals should be reversed.

Respectfully submitted.

ROBERT H. BORK,
Solicitor General.
HENRY E. PETERSEN,
Assistant Attorney General.
EDWARD H. KORMAN,
Assistant to the Solicitor General.
JEROME M. FEIT,
VICTOR D. STONE,
Attorneys.

NOVEMBER 1973.

U.S. GOVERNMENT PRINTING OFFICE: 1973